IN THE

Supreme Court of the United States

October Term, 1973

No. 73-5175

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

CALVIN C. TURBERVILLE,

Petitioner,

vs.

TEXACO INC. and A. L. GANDY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION TO MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND PETITION FOR WRIT OF CERTIORARI

PETITION NOT PRINTED

CHARLES F. KAZLAUSKAS, JR.
135 East 42nd Street
New York, New York 10017

DAVID W. GREEN
Post Office Box 2245
Mobile, Alabama 36601

Attorneys for Respondent Texaco Inc.

Of Counsel:

PILLANS, REAMS, TAPPAN, WOOD, ROBERTS & VOLLMER
P.O. Box 2245
Mobile, Alabama 36601

TABLE OF CONTENTS

Texaco's Brief in Opposition to Petitioner's Motion for Leave to Proceed *In Forma Pauperis*

PAGE

Statement of the Case 2

ARGUMENT

Since the District Court Has Certified That This Appeal Is "Frivolous and Without Merit," Petitioner's Motion for Leave to Proceed *In Forma Pauperis* in This Court Should Be Denied as It Was by Both the District Court and the Court of Appeals with Respect to Petitioner's Appeal Below 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Hayes v. *United States*, 258 F.2d 400 (5th Cir. 1958), *cert. denied*, 358 U.S. 856 (1968) 4

Holt v. *United States*, 279 F.2d 735 (6th Cir. 1960), *cert. denied*, 364 U.S. 928 (1960) 4

Johnson v. *United States*, 352 U.S. 565 (1957) 4

Maloney v. *E. I. DuPont de Nemours & Co.*, 396 F.2d 939 (D.C. Cir. 1967), *cert. denied*, 396 U.S. 1030 (1970) 5

Smith v. *Firestone Tire and Rubber Co.*, 255 F.Supp. 905 (E.D. Pa. 1966), *aff'd* 374 F.2d 892 (3d Cir. 1967) 4

Weller v. *Dickson*, 314 F.2d 598 (9th Cir. 1963) 4

Wells v. *United States*, 318 U.S. 257 (1943) 4

Williams v. *Field*, 394 F.2d 329 (9th Cir. 1968), *cert. denied*, 393 U.S. 891 (1968) 5

Other Authorities: PAGE

Rule 50(a) of the Federal Rules of Civil Procedure 2

Section 4 of the Clayton Act, 15 U.S.C. § 15 2

28 U.S.C. § 1915(a) 4

Texaco's Brief in Opposition to Petition for Writ of Certiorari

Opinion Below 7

Jurisdiction 7

Questions Presented 7

Statement of the Case 9

ARGUMENT

Petitioner's Case Is Frivolous and Clearly Does Not Warrant Review 11

The Patent Insufficiency of the Petition 11

Petitioner's Baseless Robinson-Patman Claim that the Lower Courts Held that He Could Not, as a Matter of Law, Compete with His Supplier 12

Petitioner's Other Baseless Robinson-Patman Claim 13

Petitioner's Baseless Horizontal Price-Fixing Claim 14

CONCLUSION 16

Table of Authorities

Cases: PAGE

American Oil Co. v. *FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) 13

Belliston v. *Texaco Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972) 15

Chicago Sugar Co. v. *American Sugar Refining Co.*, 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950) 12

Di-Wal Inc. v. *Fibreboard Corp.*, Trade Reg. Rep. [1970 Trade Cas. ¶73, 155] (N.D. Cal. 1970) 15

Guyott Co. v. *Texaco Inc.*, 261 F.Supp. 942 (D. Conn. 1966) 12

Jarrett v. *Pittsburgh Plate Glass Co.*, 131 F.2d 674 (5th Cir. 1942) 12

Jones v. *Shell Oil Co.*, Civil No. 47,261, Tr. 4472-73 (N.D. Cal. 1969) 15

Minneapolis-Honeywell Regulator Co. v. *FTC*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952) 13

Sano Petroleum Corp. v. *American Oil Co.*, 187 F.Supp. 345 (E.D.N.Y. 1960) 12

Secatore's Inc. v. *Esso Standard Oil Co.*, 171 F.Supp. 665 (D. Mass. 1959) 12

Shell Oil Company, 54 F.T.C. 1274 (1958) 12

United States v. *FMC Corp.*, 306 F.Supp. 1106 (E.D. Pa. 1969) 15

PAGE

Webster v. *Sinclair Refining Co.*, 338 F.Supp. 248 (S.D. Ala. 1971) 12, 15

Wall Products Co. v. *Nat'l Gypsum Co.*, 326 F.Supp. 295 (N.D. Cal. 1971) 15

Other Authorities:

28 U.S.C. § 1254(1) 7

Federal Trade Commission, *Statement of Policy on the Marketing of Gasoline*, 3 CCH Trade Reg. Rep. ¶ 10,373, p. 18,244 12

Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), p. 178 13

Rule 23(4) of the Rules of the Supreme Court of the United States 11

Rule 21 of the Rules of the United States Court of Appeals for the Fifth Circuit 8

IN THE

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No. 73-5175

CALVIN C. TURBERVILLE,

Petitioner,

vs.

TEXACO INC. and A. L. GANDY,

Respondents.

TEXACO'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

This brief is submitted by Respondent Texaco Inc. (hereafter "Texaco") in opposition to Petitioner's motion for leave to proceed *in forma pauperis.*

Petitioner's motion to require the public to subsidize his appeal is made in the teeth of the District Court's determination that the proposed appeal is frivolous, a conclusion confirmed by the *per curiam* affirmance without opinion by the Court of Appeals for the Fifth Circuit, and that Court's *per curiam* denial of Petitioner's petition for rehearing and rehearing en banc.

Statement of the Case

On June 13, 1970, Petitioner, a former service station operator, brought this action against Texaco and the wholesale consignee through whom he obtained Texaco gasoline, A. L. Gandy, alleging violations of the Sherman and Robinson-Patman Acts in broad conclusory language and seeking treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. After an extended period of discovery,[1] the case was set down for trial on February 28, 1972. On March 8, 1972, after a trial of seven days, on motion of defendants pursuant to FRCP 50(a), the District Court directed that the jury return a verdict for defendants and, on the same day, final judgment was entered in their favor.

On March 17, 1972, Petitioner's attorney filed in the District Court a notice of appeal with a motion for permission to appeal *in forma pauperis*. On April 7, 1972, the District Court entered an order denying Petitioner's motion, based upon its conviction that ". . . this case is frivolous and without merit . . . ." (Order on Plaintiff's Motion to Appeal In Forma Pauperis, pp. 2-3). On April 26, 1972, Petitioner's attorney moved in the Court of Appeals for the Fifth Circuit for leave to proceed *in forma pauperis*. On May 30, 1972, that Court denied Petitioner's motion.

On May 18, 1973, the judgment of the District Court was affirmed *per curiam* without opinion by the Court of Ap-

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[1] It may be noted that the discovery was unduly prolonged by Petitioner's continual failure to provide full and complete answers to defendants' interrogatories. Thus, on four separate occasions, the District Court was compelled to order plaintiff to file more complete and responsive answers to interrogatories.

peals for the Fifth Circuit, and on June 27, 1973, Petitioner's petition in that Court for rehearing and rehearing en banc was denied *per curiam*.

ARGUMENT

Since the District Court Has Certified That This Appeal Is "Frivolous and Without Merit," Petitioner's Motion for Leave to Proceed *In Forma Pauperis* in This Court Should Be Denied as It Was by Both the District Court and the Court of Appeals with Respect to Petitioner's Appeal Below.

At the outset, it should be noted that it is some measure of Petitioner's lack of candor with this Court that he has not seen fit to apprise it of his prior motions both in the District Court and in the Court of Appeals for leave to appeal below *in forma pauperis*, and of the denial of both of those motions, with the District Court's certifying that the appeal was "frivolous and without merit." It is respectfully submitted that in light of the above, there can be no question but that Petitioner should be denied such relief in this Court.[2]

Congress, in providing for public subsidization of appeals by indigents, elected not to leave it entirely to the indigent to determine whether his appeal had sufficient merit to

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[2] It is also worthy of note that despite Petitioner's sworn statement in identical affidavits submitted to the District Court and to the Court of Appeals on his motions for leave to appeal *in forma pauperis* that "because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor," (Petitioner's Affidavit, sworn to March 15, 1972), Petitioner nonetheless prosecuted his appeal after his motions were denied.

warrant the expenditure of taxpayers' funds. Those funds, as Congress obviously recognized, are not unlimited and are hardly adequate for the myriad worthy calls upon them. Thus, Section 1915(a) of the Judicial Code provides: "An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a).

Plainly, if an appeal is frivolous and without merit—as the trial court certified here—it is not taken "in good faith" for purposes of § 1915(a). See, *e.g., Hayes* v. *United States*, 258 F.2d 400, 401-402 (5th Cir. 1958), *cert. denied*, 358 U.S. 856 (1958).

It is equally clear that a certification by the district court that an appeal is not taken in good faith is entitled to "great weight" by an appellate court, *Johnson* v. *United States*, 352 U.S. 565, 566 (1957), and "is not to be lightly discarded." *Holt* v. *United States*, 279 F.2d 735, 737 (6th Cir. 1960), *cert. denied*, 364 U.S. 928 (1960). Indeed, it has been held that such a certification must be accepted by the appellate courts as *"controlling* in the absence of some showing that the certificate is made *without warrant* or *not in good faith."* *Wells* v. *United States*, 318 U.S. 257, 259 (1943). (Emphasis added.)

This is particularly true in civil actions, like the present one, where plaintiff asks the Government of the United States to "shoulder the costs of private commercial litigation. . . ." *Smith* v. *Firestone Tire and Rubber Co.*, 255 F.Supp. 905, 909 (E.D. Pa. 1966), *aff'd* 374 F.2d 892 (3d Cir. 1967). As the Ninth Circuit held in *Weller* v. *Dickson*, 314 F.2d 598, 600 (9th Cir. 1963), the privilege of appealing *in forma pauperis* in civil damage actions should be allowed only in "exceptional circumstances," and a certificate deny-

ing such an appeal should be overruled only where it is shown that the district court has "clearly abused [its] statutory discretion. . . ." *Accord, Maloney* v. *E. I. DuPont de Nemours & Co.*, 396 F.2d 939, 940 (D.C. Cir. 1967), *cert. denied*, 396 U.S. 1030 (1970); *Williams* v. *Field*, 394 F.2d 329, 332 (9th Cir. 1968), *cert. denied*, 393 U.S. 891 (1968).

It need hardly be added that neither in this Court nor in the Court of Appeals has there been any showing whatsoever that the District Court in any way abused its discretion in certifying Petitioner's appeal as "frivolous and without merit." To the contrary, as indicated above, the Court of Appeals not only denied Petitioner's motion for this relief below, but affirmed *per curiam* without opinion the judgment of the District Court and denied Petitioner's petition for rehearing and rehearing en banc. As to the Petition to this Court, it is respectfully submitted that Texaco's Brief in Opposition to Petition for Writ of Certiorari, *infra*, amply demonstrates that the District Court's assessment of Petitioner's appeal was correct and that the appeal is indeed frivolous.[3]

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[3] Respondent is of course in no position to appraise the accuracy of Petitioner's summary of his "financial situation" as set forth in his affidavit submitted in support of this motion. However, even apart from the question of whether a person with Petitioner's income is entitled to proceed *in forma pauperis*, Petitioner's utter failure to include in his affidavit any statement as to his assets should render the affidavit insufficient.

CONCLUSION

It is respectfully submitted that Petitioner's motion for leave to proceed *in forma pauperis* should be denied.

Dated: August 29, 1973

Respectfully submitted,

CHARLES F. KAZLAUSKAS, JR.
135 East 42nd Street
New York, New York 10017

DAVID W. GREEN
Post Office Box 2245
Mobile, Alabama 36601

Attorneys for Respondent Texaco Inc.

Of Counsel:

PILLANS, REAMS, TAPPAN, WOOD,
ROBERTS & VOLLMER
P.O. Box 2245
Mobile, Alabama 36601

TEXACO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The decision of the Court of Appeals affirming the judgment below is reported at 477 F.2d 595 under Affirmances Without Published Opinion. The decision of the Court of Appeals denying the petition for rehearing and rehearing en banc has not yet been reported. No opinion was written by the District Court.

Jurisdiction

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on May 18, 1973, and a petition for rehearing and rehearing en banc was denied on June 27, 1973.

Questions Presented

It is respectfully submitted that Petitioner's Questions Presented, listing five purported questions presented for review by this Court, totally departs from and distorts the record and the decisions of the Courts below. As will be demonstrated below, and as confirmed by both the District Court and the Court of Appeals, there are in fact no substantial issues worthy of review in this Petition.

The District Court evidenced its judgment that this appeal raises no substantial issues by rejecting Petitioner's attempt to have his appeal below prosecuted at the taxpayers' expense, certifying that it was

". . . the conviction of this court that this case is frivolous and without merit. * * *"[1]

The Court of Appeals similarly demonstrated its view that there are no substantial issues worthy of review in this case by affirming the judgment of the District Court *per curiam*, and without opinion pursuant to its Local Rule 21.[2] The Court of Appeals' affirmance pursuant to Rule 21 makes clear that aside from its determination that the result below was correct, the Court was also satisfied that the case was decided upon principles so well established that a written opinion would, in the words of the Rule, "have no precedential value."

It is respectfully submitted that this case, presenting no issues worthy even of an opinion by the Court of

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[1] Order on Plaintiff's Motion to Appeal *In Forma Pauperis*, April 7, 1972. The Order further expressed the Court's

"* * * judgment that the case was a fishing expedition and grew out of a disgruntled relationship due to friction between the defendant Gandy, the oil company's distributor, and the plaintiff, compounded by financial difficulties attributable primarily to personal problems of the plaintiff."

[2] "Rule 21. AFFIRMANCE WITHOUT OPINION

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; *and the court also determines that an opinion would have no precedential value*, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

See N. L. R. B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, —— F.2d ——. (Emphasis added.)"

Appeals, clearly presents no issues justifying review by this Court.

Statement of the Case

It is perfectly apparent that Petitioner is attempting to do in this Court what it unsuccessfully sought to do in the Court of Appeals: To substitute for evidence a confusing array of baseless allegations having no support in the record, and to substitute for legal arguments a disjointed series of *non sequiturs*. To the extent that Petitioner's Statement of the Case is comprehensible, it is so at variance with the record[3] that it would unduly lengthen this brief and burden this Court to attempt a point by point refutation. For the Court's convenience, a brief statement of the case follows:

On April 3, 1963, Petitioner Turberville left his employment as a truck driver for a furniture company (461-62)[4] and leased a service station located on U.S. Highway 31 in Atmore, Alabama, from Respondent A. L. Gandy and his wife (465). Mr. Turberville operated this station as a Texaco retailer until March, 1970. During this period, A. L. Gandy was an independent businessman (158-59) distributing Texaco branded gasoline to Texaco accounts from his gasoline bulk plant in Atmore (472). Pursuant to a written sales agreement for petroleum products between Texaco and Petitioner, Gandy supplied these products to Petitioner.

When Plaintiff left the service station in March, 1970, his license to do business had expired (697-99), he owed

[3] There is not a single record citation in the entire Petition.

[4] Numbers in parentheses refer to the original transcript unless otherwise indicated.

debts to Mr. Gandy (689), was in debt to Texaco (721), had his business seized by the Internal Revenue Service (717-19) and was in default on a Small Business Administration loan (639, 1160).

Texaco's sales agreement with Petitioner was still in effect when he abandoned the station (628-29). He was invited by the Gandys to continue at the premises, but decided to leave of his own account (58-9, 928).

On July 13, 1970, Petitioner commenced this action alleging a wide range of antitrust violations: monopolization, tying arrangements, horizontal and vertical price-fixing, customer allocations and Robinson-Patman claims.[5] Trial commenced on February 28, 1972 and continued until March 8, 1972, at which time the District Court directed that the jury return a verdict for defendants.

The District Court's grant of the foregoing directed verdict was eminently correct, as was the affirmance of that decision by the Court of Appeals.

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[5] On the basis of the Questions Presented, Petitioner has limited his request for review to his horizontal price-fixing and Robinson-Patman claims, abandoning the myriad other frivolous claims which were dismissed below.

ARGUMENT

Petitioner's Case Is Frivolous and Clearly Does Not Warrant Review.

The Patent Insufficiency of the Petition

Rule 23(4) of the Rules of this Court provides that the "failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." It is respectfully submitted that this Petition fails on every score.

The lack of clarity and brevity is apparent on the face of the Petition. Rather than presenting a clear, concise and documented statement and explanation of the points in issue, Petitioner has simply continued the course he followed in the Courts below by embarking upon yet another unintelligible diatribe.

What is perhaps even more significant is the pervasive inaccuracy of the Petition. Indeed, Petitioner so distorts the proceedings below as to render impossible any meaningful consideration of the Petition by this Court. In this regard, one need only look at some of Petitioner's incredible characterizations of the rulings below. Thus, Petitioner would have this Court believe that the lower courts ruled that Petitioner "could not as a matter of law compete against his supplier" (Pet. 11) and that "price fixing in this case was legal." (Pet. 17). Needless to say, no such contentions or rulings were made below.

Moreover, this case presents no novel issue, no substantial question and no conflict with the decision of any other circuit. Petitioner's casualty in court is an every-day event

in the annals of litigation—a plaintiff loses his case because of a failure of proof on the basis of established legal principles. The Court of Appeals recognized this and affirmed without opinion. Nothing in the Petition and nothing in the proceedings below justifies review by this Court of this run-of-the-mill case.

Petitioner's Baseless Robinson-Patman Claim that the Lower Courts Held that He Could Not, as a Matter of Law, Compete with His Supplier

Petitioner's assertion in support of the first of his Questions Presented—that the lower courts held that he could not, as a matter of law, compete with Texaco for consumer accounts (Pet. 11, 16)—is sheer invention.[6] No such contention was made by Texaco nor was any such ruling made below. What Texaco contended, and what Petitioner seems unable to accept, is that nothing in the antitrust law either prohibits a supplier from competing against anyone for non-reselling consumer accounts, or gives a dealer any claim because he is at an economic disadvantage in attempting to compete with his supplier for such business. See, *e.g.*, *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F.2d 1, 10 (7th Cir. 1949), *cert. denied* 338 U.S. 948 (1950); *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F.2d 674 (5th Cir. 1942); *Shell Oil Company*, 54 F.T.C. 1274 (1958); *Secatore's Inc.* v. *Esso Standard Oil Co.*, 171 F.Supp. 665 (D. Mass. 1959); *Sano Petroleum Corp.* v. *American Oil Co.*, 187 F.Supp. 345 (E.D.N.Y. 1960); *Guyott Co.* v. *Texaco Inc.*, 261 F.Supp. 942 (D. Conn. 1966); *Webster* v. *Sinclair Refining Co.*, 338 F.Supp. 248 (S.D. Ala. 1971); Federal Trade Commission, *Statement of Pol-*

[6] Question 2 of the Petition merely restates Question 1 in somewhat different terms.

icy on the Marketing of Gasoline, 3 CCH Trade Reg. Rep. ¶ 10,373, p. 18,244; Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), p. 178.

There being no violation of law, we need not dwell on the further fact that Petitioner failed to offer any evidence, other than his own hope, that he would have sold to any consumer account, much less any evidence that he would have profited from such business.

Petitioner's Other Baseless Robinson-Patman Claim

Questions 3 and 3(a) in the Petition relate exclusively to Texaco's meeting-competition defense to Petitioner's other Robinson-Patman claim. That claim was based on allegations that Petitioner paid more for his gasoline during temporary price war periods than did competing Texaco dealers. The first and fatal problem with this claim was that Petitioner failed to prove that any Texaco dealer in substantial competition with him received a lower net price than he did (1355-56). Secondly, Petitioner failed to prove that the claimed discrimination was of such an extent and duration as would be likely to cause substantial injury to competition.[7] See *American Oil Co.* v. *FTC*, 325 F.2d 101, 104, 106 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), and *Minneapolis-Honeywell Regulator Co.* v. *FTC*,

[7] Petitioner testified that he had no recollection of when or where "gas wars" occurred, how long they lasted, or the extent of the price depressions (655-57). He could not identify a single sale lost because of a price war (657), nor did he retain any sales records by which he could compare his gallonage figures during the periods of "gas wars" and normal periods (658). Plaintiff's counsel elicited the recollection of Petitioner's son that there was an average of three price wars a year, each lasting about two to two-and-a-half weeks (81). Since the area could vary, the favored dealer might enjoy his "favored" position for only one two-week period every few years.

191 F.2d 786, 790 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952). In short, Petitioner wholly failed to make out a *prima facie* case of price discrimination in violation of Section 2(a). What is more, there was no showing that Petitioner had sustained injury or measurable damages as a proximate result of the claimed discrimination. And yet Petitioner does not even address itself to any of these matters—each of which was an independently self-sufficient reason for dismissing Petitioner's Robinson-Patman claim, wholly apart from the fact that Texaco was meeting competition in good faith. Under the circumstances, even though Texaco's Section 2(b) defense was proven by uncontroverted evidence, there was no need for either of the lower Courts to reach that defense. Hence, Question 3 and 3(a) are not properly before this Court.

Unless the mere filing of a price discrimination allegation entitles a plaintiff to go to the jury, a directed verdict for the defendants was mandated here.

Petitioner's Baseless Horizontal Price-Fixing Claim

Petitioner's fourth and fifth Questions Presented relate to Petitioner's baseless horizontal price-fixing claim.[8] In affirming the judgment of the District Court dismissing this claim, the Court of Appeals acted on a record totally devoid of any evidence of any agreement between Texaco and any of its competitors with respect to the prices at which gasoline is to be sold to dealers. The only evidence introduced by plaintiff on this issue involved the verification of publicly available current prices, and the courts

[8] Question 5—"Does The Sherman Act proscribe only conspiracies to restrain trade rather than proscribe contracts, combinations, agreements, or conspiracies in restraint of trade?"—is ludicrous on its face.

below merely applied settled law in ruling that this, standing alone, was insufficient to establish a price fixing agreement. See, *e.g.*, *Belliston* v. *Texaco Inc.*, 455 F.2d 175, 181-82 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972); *Webster* v. *Sinclair Refining Co.*, 338 F.Supp. 248 (S.D. Ala. 1971); *Di-Wal Inc.* v. *Fibreboard Corp.* Trade Reg. Rep. [1970 Trade Cas. ¶73,155] (N.D. Cal. 1970); *Wall Products Co.* v. *Nat'l Gypsum Co.*, 326 F.Supp. 295 (N.D. Cal. 1971); jury instruction in *Jones* v. *Shell Oil Co.*, Civil No. 47,261, Tr. 4472-73 (N.D. Cal. 1969), referred to in *Wall Products Co.* v. *Nat'l Gypsum Co.*, *supra* at 315. See also, *United States* v. *FMC Corp.*, 306 F.Supp. 1106 (E.D. Pa. 1969).

Moreover, there was no evidence with respect to whether the alleged price verification had any impact whatever on prices, and no evidence from which a jury could have awarded any damages to Petitioner.

CONCLUSION

This Petition, seeking to saddle this Court with an appeal already adjudicated as "frivolous and without merit" by the District Court, and already rejected *per curiam* without opinion by the Court of Appeals, clearly fails to raise any novel issue, substantial question or conflict with any other circuit. Indeed, the Petition fails even to satisfy this Court's elemental requirements of accuracy, brevity and clearness. This being a classic example of the type of case with which this Court should not be burdened, it is respectfully submitted that the Petition should be denied.

Dated: August 29, 1973

Respectfully submitted,

CHARLES F. KAZLAUSKAS, JR.
135 East 42nd Street
New York, New York 10017

DAVID W. GREEN
Post Office Box 2245
Mobile, Alabama 36601

Attorneys for Respondent Texaco Inc.

Of Counsel:

PILLANS, REAMS, TAPPAN, WOOD,
ROBERTS & VOLLMER
P.O. Box 2245
Mobile, Alabama 36601